Supreme Court, U.S.
FILED
SEP 21 1990
ROBERT F. SPANIOL, JR.
CLERK

No. 89-1604

In The

Supreme Court of the United States

October Term, 1990

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Oregon

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

JURISDICTION

Respondents raise the question of jurisdiction because the Petition for Certiorari was filed within ninety days after the Oregon Supreme Court's final decision on reconsideration but before the Oregon court issued its mandate or "appellate judgment". The Oregon court issued its final decision on reconsideration January 11, 1990; petitioners filed for certiorari April 11, 1990; the Oregon court issued is "appellate judgment" August 8, 1990. ORAP 14.05(2). The Oregon decision below is now unquestionably final.

ARGUMENT

I. PETITIONERS HAVE ACCURATELY DESCRIBED THE QUESTION PRESENTED IN THIS CASE.

Respondents seek to escape review in this case by contending that petitioners have misconstrued the Oregon Supreme Court's decision and have therefore failed properly to phrase the "question presented". First, respondents' interpretation of the Oregon decision is strained and inaccurate. Second, the question whether petitioners are prevailing parties under 42 U.S.C. Section 1988 is fairly presented in this case however one construes the Oregon court's decision.

A. Respondents' reconstruction of the Oregon court's decision is inaccurate.

This case presents the question whether plaintiffs are prevailing parties under 42 U.S.C. Section 1988 where they

prevail on a state constitutional claim and the court therefore fails to reach and decide on its merits a substantial federal constitutional claim arising out of the same nucleus of operative fact. Respondents contend that question is not presented here because the Oregon court did not "fail to reach" plaintiffs' federal claim but rather held that the federal claim was without merit because plaintiffs prevailed on their state claim.[1] In making this argument, respondents ignore most of the Oregon court's reasoning.

The fact is that the Oregon court's decision draws no distinction among the following statements:

> (1) Where plaintiffs prevail on a state claim, the court "need not determine" plaintiffs' federal claims, *OSPOA v. State of Oregon*, 308 Or. 531, 537, 783 P.2d 7, 10 (1989);
>
> (2) Where plaintiffs prevail on state claims, their federal claims are "unecessary". *Id.* at 538-39, 738 P.2d at 11; and
>
> (3) Where plaintiffs prevail on a state claim, the state has denied them no federal rights. *Id.*

The Oregon court uses each of these formulations in explaining its decision to deny plaintiffs their federal statutory right to attorney fees. First, at the end of Section III of its Opinion, the Oregon court says:

> "Because we hold that ORS 181.400(2) violates Article I, Section 8 [of the Oregon Constitution], we need not determine plaintiffs' claims under Article I, Section 20, of the Oregon Constitution

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[1] Respondents' contention that plaintiffs' federal claims are not justiciable is surprising in light of their argument that the Oregon Supreme Court decided those claims on the merits. The Oregon court must raise the issue of justiciability *sua sponte* where necessary. *Oregon Medical Ass'n v. Rawls*, 281 Or. 292, 574 P.2d 1103 (1978). It did not in this case.

> or under the First and Fourteenth Amendments."

308 Or. at 537, 783 P.2d at 10.

Having decided not to reach plaintiffs' federal claims on their merits but only to consider them for purposes of deciding the attorney fee issue, the Oregon court then relies on *Roberts v. Mills*, 291 Or. 21, 628 P.2d 714 (1981), an habeas corpus case in which it held that the reliance on 42 U.S.C. Section 1983 for relief "turned out to be superfluous" because the habeas corpus petitioner had an adequate state remedy. The Oregon court then goes on to hold below that, because plaintiffs had a state remedy, the state denied them no federal rights:

> In this case, state remedies are adequate to protect plaintiffs' rights. Therefore, the state did not deny them any federal constitutional rights. Because plaintiffs were entitled to relief based upon an interpretation and application of the Oregon Constitution, *their invocation of 42 U.S.C. Section 1983 was unnecessary to the decision or the relief granted.*

308 Or. at 538, 783 P.2d at 11 (emphasis added). The Oregon court obviously draws no distinction between the idea that no federal right is denied where a state remedy is provided and the idea that reliance on federal law is unnecessary where state claims provide relief.[2]

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[2] The Oregon Court of Appeals seems to think the supreme court meant state claim success makes a federal claim "unnecessary". *Saylor v. State Water Resources Dep't.*, 100 Or. App. 745, 787 P.2d 494 (per curiam), *rev. den.* 310 Or. 122, ___ P.2d ___ (1990). The Supreme Court's denial of review belies the state's contention that the court will "further develop" its rationale for denying civil rights attorney fees. *See* Respondents' Opposition at 10-12.

Finally, the Oregon court explains that reliance on federal remedies may be considered "necessary" where the state right is not so clear:

> There may be cases in which protection of a claimed right under the Oregon statutory or constitutional law is in doubt, for instance, because lower court or responsible state agencies have previously rejected the claim, so that reliance on a federal constitutional guarantee reasonably can be said to be necessary. But this court's modern decisions under Article I, Section 8 [of the Oregon constitution], should leave no basis to believe that a citizen of Oregon must invoke the federal constitution to protect rights to free political speech and participation.

308 Or. at 538-39, 783 P.2d at 11. This language squarely contradicts the respondents' argument that the court has held plaintiffs' federal claims were without merit because plaintiffs prevailed on their state claims. If respondents were right it would make no difference whether the plaintiffs' right to state relief was entirely obvious or very much in doubt – whenever plaintiffs prevailed under state law, their federal claims would automatically be found to be without merit. No fair reading of the Oregon court's decision in this case can so construe it.

Plaintiffs' federal claims were not defeated in this case; they were found "unnecessary," and the courts did not reach their merits. The Oregon court's reasoning ignores the intent of Congress and the holdings of this Court, all of the federal appellate decisions which have considered the issue, and the vast majority of decisions of state courts of last resort. Respondents fail to address any of these authorities.

B. Petitioners' Question Presented fairly includes all the arguments respondents raise.

This Court's Rules provide:

> The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

Supreme Court Rule 14.1.(a). Even if respondents had correctly construed the Oregon court's decision below, the question presented would not change. The question is whether plaintiffs are "prevailing parties" under 42 U.S.C. Section 1988. Plaintiffs are prevailing parties because they had a substantial, but undecided federal claim which arose out of the same nucleus of operative facts as did the state claim on which they prevailed. Respondents argue plaintiffs are not prevailing parties because, though they agree plaintiffs prevailed on a state claim and that their federal claim arose out of the same nucleus of operative facts, they contend plaintiffs' federal claim was found to be meritless. Respondents also argue plaintiffs' federal claim was not "substantial". It is hardly unusual for the parties to disagree as to procedural facts or as to the phrasing of an issue. That does not make the question presented a different question. Nor does it remove the issue in this case from the realm of those fairly included in the question plaintiffs have presented.

Plaintiffs' Question Presented is exactly the question presented in this case. Respondents' focus on avoiding the question rather than on responding to it should not hamper this Court's review.

II. THE STATE DID DENY PLAINTIFFS' FEDERAL RIGHTS.

The state statute ultimately declared unconstitutional in this case had, since 1931, denied every member of the Oregon State Police all political rights other than voting. Former ORS 181.400(2).[3] The uncontradicted testimony at trial was that several state troopers had decided not to undertake various forms of political activity and that the plaintiff State Police Association had declined to print political material in its newspaper or to support any political candidate because of the statute Tr[4] 13, 15, 17, 22-26, 101-02. The chilling effect of the statute, especially on police officers sworn to uphold the law, cannot seriously be questioned.

When plaintiffs decided in 1985 to challenge the statute, they consulted with respondents concerning possible legislative modification or other means not involving litigation by which the issue could be handled. The State Attorney General took the position that the statute was entirely constitutional.[5] Respondents, through the State Attorney General's Office argued that the statute was constitutional under the state and federal constitutions through appeals to the Oregon Court of Appeals and the

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[3] Respondents' attempt to trivialize this by citing *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (NDNY 1977) (teenage curfew ordinance) should fail. This case restored fundamental rights of citizenship to 650 Oregon Troopers and 300 management personnel.

[4] "Tr" refers to the transcript of the trial below.

[5] Plaintiff's Petition for Award of Attorney Fees (in trial court), Affidavit of Counsel at 2.

Oregon Supreme Court.[6] It is only in this Court that the state finally acknowledges the statute was "patently invalid" under the Oregon Constitution. Respondents' Brief in Opposition at 12. Until the Oregon Supreme Court's decision, no responsible attorney could have advised plaintiff State Police Association or any of its members to engage in political activity in violation of ORS 181.400(2) – that is, in any political activity at all. Until the Oregon Supreme Court rendered its decision, the state indeed denied plaintiffs their right to engage in political activity. There is no dispute that that is a right protected by the First Amendment to the United States Constitution.

The State's argument that the state denies no federal rights as long as the ultimate result of state court litigation favors plaintiffs on state grounds is based on an argument made by recently retired Oregon Supreme

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[6] Respondent's statement that they have "maintained throughout this litigation" a position that the state constitutional provision presented the only serious question is simply false. At the trial court level and in the Oregon Court of Appeals, the state argued that the federal and state constitutions provided identical protections for plaintiffs' rights:

> "at least, the court has not interpreted the state constitution different from or more expansive than federal decisions that have interpreted the First Amendment in like circumstances."

State's Brief in Oregon Court of Appeals at 30. In the Oregon Supreme Court, the state made no distinction between the federal and state constitutional provision except to argue that the federal claim was not "substantial". Indeed, the first broad holding in an Oregon Supreme Court civil case that the government may not regulate speech but only its provable adverse effects is found in *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988), decided three years after this case was filed in the trial court.

Court Justice Hans Linde in a 1970 Law Review Article.[7] Justice Linde's law review argument was made without citation to any authority, and it has never, in twenty years, been relied upon by any court in the way respondents now attempt to use it.[8] While Justice Linde's syllogism has some superficial appeal, it has no foundation in fact or jurisprudence outside the realm of due process of law.[9] It is one thing to say that a claim for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution is answered where the state courts provide adequate process. It is something else entirely to say that an ongoing denial of rights by a state legislature and state administrative agency with the assistance of the state Attorney General's Office disappears as if it had never occurred when the state court of last resort finally says the state constitution prohibits what the legislative and administrative bodies have done.

Oregon State Troopers were faced with the choice of violating state law or giving up their political rights from 1931 until the Oregon Supreme Court's decision in this case in 1989. The state was never willing on its own to provide relief. Plaintiffs were required to seek counsel and prosecute legal action through the Oregon trial and

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[7] Linde, "Without Due Process", 49 *Oregon Law Review* 125, 134-35 (1970).

[8] Indeed, Justice Linde does not mention this argument in his concurring opinion below.

[9] *E.g., Parratt v. Taylor*, 451 U.S. 527 (1981); *Suess Builders v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982). Indeed Justice Linde's theory was never intended to address the issue of entitlement to attorney fees under Section 1988. Its intention was simply to show that state constitutional claims should be considered before their federal counterparts. Linde, *supra*, n.5 at 134-35.

appellate system in order to obtain relief. It is the purest fiction to say that the State of Oregon denied plaintiffs no federal right.[10]

Respondents make no attempt to square their theory of this case with the legislative history which this Court quoted in *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 570 (1980):

> To the extent a plaintiff joins a claim under one of the [federal civil rights statutes] with a claim that does not allow federal attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. * * * in some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. * * * In such cases, if the claim for which fees may be awarded meets the "substantiality" test, * * * attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that [federal constitutional] claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact".

Id., 448 U.S. at 132 n.15, 100 S.Ct. 76 n.15. (citations omitted). Respondents' argument would make nonsense of this congressional logic. According to respondents, the fact that one has prevailed on the non-fee (state constitutional) claim means that one's federal claim is without

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[10] At least until the trial court issued its decision in July, 1987, plaintiffs had received no help from any state agency. Of course, most of the attorney fees awarded in this case (more than $25,000), are attributable to work done before the trial court issued its decision. The trial court ruled for plaintiffs not only on their Oregon constitutional claim but also on their First and Fourteenth Amendment claims under 42 U.S.C. Section 1983.

merit. If the mere right to relief under the state constitution automatically precludes an award of attorney fees under Section 1988, all of the cases decided under that statute since 1976 have been wrongly decided. They have not. If the Oregon Court had done what the state now argues it did, its violation of Section 1988 would be just as clear as it is in fact.

CONCLUSION

This case presents a central and urgent issue in the litigation of civil rights claims against the states. This record presents the issue clearly, without material factual dispute, and without procedural complication.[11] The Oregon Supreme Court has denied plaintiffs' federal rights and ignored federal law. A writ of certiorari should be granted and the case remanded for reinstatement of the attorney fee awards below and for an award of attorney fees in the Oregon Supreme Court.

Respectfully submitted,

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[11] Respondents' contention that there are discretionary grounds to deny attorney fees in this case (Respondents' Brief at 17-19) ignores this Court's controlling decisions. *E.g. Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Section 1988 fees are to be awarded "unless special circumstances would render such an award unjust". *Id.* There are no such circumstances in this case.